83-1342

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

WILLIE F. ALLEN, d/b/a
WILLIE F. ALLEN JANITORIAL SERVICE,
Petitioner,

v.

GREENVILLE COUNTY,
a POLITICAL SUBDIVISION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether civil rights plaintiffs are barred under the doctrine of *res judicata* and claim preclusion from litigating issues that theoretically could have been raised in prior proceeding in state court on a different cause of action.

2. Whether the Fourth Circuit Court of Appeals misinterpreted the South Carolina law governing *res judicata.*

LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the Petitioner, his family, and the Respondent, County of Greenville.

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Petitioner, WILLIE F. ALLEN, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fourth Circuit, entered into this proceeding on July 26, 1983.

OPINIONS BELOW

The Order of the United States District Court for the District of South Carolina, Greenville Division is unreported and contained in set forth in the Appendix as *Willie F. Allen, d/b/a Willie F. Allen Janitorial Service v. Greenville County, a Political Subdivision,* Civil Action No. 82-1121-14, entered August 20, 1982. The opinion of the Court of Appeals for the Fourth Circuit is published and contained and set forth in the Appendix as *Willie F. Allen, d/b/a Willie F. Allen Janitorial Service v. Greenville County, a Political Subdivision,* No. 82-1798, entered July 26, 1983.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered July 26, 1983 and is entitled *Willie F. Allen, d/b/a Willie F. Allen Janitorial Service v. Greenville County, a Political Subdivision,* No. 82-1798. The Court of Appeals for the Fourth Circuit entered a denial of Petitioner's request for rehearing on October 18, 1983. The Honorable Chief Justice Warren Burger of the United States Supreme Court entered an Order Extending The Time to File Petition For Writ of Certiorari on February 1, 1984 in the case of *Willie F. Allen, d/b/a Willie F. Allen Janitorial Service v. Greenville County, a Political Subdivision,* No. A-608. Jurisdiction is invoked pursuant to the provisions of 28 USC Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the following constitutional provisions and statutes relevant to the determination of the present case are set forth in Appendix:

U.S. Constitution Amendment XIV
28 U.S.C. Section 1254 (1)
28 U.S.C. Section 1291 (1)
28 U.S.C. Section 1331
28 U.S.C. Section 1738
42 U.S.C. Section 1981
42 U.S.C. Section 1982
42 U.S.C. Section 1983
42 U.S.C. Section 1988

STATEMENT OF THE CASE

The Petitioner, Willie F. Allen, (hereinafter referred to as Petitioner) brought suit in the United States District Court for the District of South Carolina, Greenville Division, against the Respondent, Greenville County (hereinafter referred to as Respondent) for violation of Civil Rights pursuant to 42 USC

Section 1981; 1982; 1983; 1988; 28 USC Section 1331 and U.S. Constitutional Amendment XIV. The Petitioner sought money damages for racial discrimination in employment by the Respondent.

The Petitioner owns a company which provides janitorial services. The name of the company is Willie F. Allen Janitorial Service. Sometime during the year of 1980, the Petitioner, along with other cleaning contractors submitted bids to the Respondents for the purpose of procuring a job to clean one of the Respondent's many public buildings. In July 1980, the Petitioner was awarded a janitorial service for twelve (12) months at a stated consideration of $126,000.00. The contract was terminable at will by either party upon (10) days' written notice.

Sometime in October 1980, Petitioner filed an action in the State Court of Greenville County seeking money damages for breaches of contract. The Petitioner did not allege in his pleadings any violation of federal rights, nor did the Petitioner in his state court trial raise any violation of his federal rights. The State Court judge thereupon directed a verdict for Respondent on or about December 1980. The Petitioner did not appeal this judgment to the State Supreme Court of South Carolina.

The Petitioner retained new counsel and filed suit in United States District Court for violation of federal rights because of racially discriminatory employment practices of the Respondent. The Respondent filed a Motion to Dismiss or in the alternative, a Motion for Summary Judgment. Subsequent to filing the Motion to Dismiss and Motion for Summary Judgment, the Respondent filed and served an Answer with the Court and Petitioner.

A hearing was had on the Motion to Dismiss and Summary Judgment on August 12, 1982 before the Honorable William W. Wilkins. Judge Wilkins issued an Order (See Appendices), in which he sustained the Respondent's Motion to Dismiss and Summary Judgment based on the doctrine of *res judicata*.

Accordingly, Petitioner appealed from the Order and judgment of the District Court Judge to the Fourth Circuit Court of Appeals, pursuant to the provisions of 28 USC 1291(1).

The Fourth Circuit Court of Appeals affirmed the judgment of the United States District Court Judge. On the appeal, the Fourth Circuit Court of Appeals skirted the federal issues involved (See Appendix for text of the Appeals Court opinion). Petitioner thereafter sought a rehearing before the three judge panel of the Fourth Circuit Court of Appeals or in the alternative, rehearing before the Fourth Circuit Court of Appeals *en banc*. This request for rehearing was denied. Petitioner now seeks review by this Honorable Court upon Petition For Certiorari.

REASONS FOR GRANTING THE WRIT

A civil rights plaintiff's right to due process and fundamental fairness under the Fourteenth Amendment to the United States Constitution and laws of the United States of America is violated where a Federal District Court bars a civil rights plaintiff under the doctrine of *res judicata* and claim preclusion from litigating Federal issues in Federal Court, that theoretically could have been raised in a prior proceeding in state court on a different cause of action.

The majority of Fourth Circuit Court of Appeals committed reversible error in misinterpreting and misapplying the laws of the State of South Carolina and affirming the judgment of the United States District Court for the District of South Carolina.

The situation presented to this Court demonstrates that the issue as to whether civil rights plaintiffs are barred under the doctrine of *res judicata* and claim preclusion from litigating issues that theoretically could have been raised in prior proceedings in State Court on a different cause of action is now ripe for United States Supreme Court review. In *Haring v. Prosise*, 103 S.Ct. 2368, 2372 n.2 stated:

> In *Metros v. United States District Court for the District of Colorado,* 441 F.2d 313 (1971), the Court of Appeals for the Tenth Circuit held that a guilty plea to one count of possession of heroin must be given preclusive effect in a subsequent civil rights action against police officers who had searched the premises in which the narcotics were found. Other federal courts have concluded, however, that civil rights plaintiffs are not barred from litigating issues that could have been raised in prior proceedings in state court on a different cause of action. See, *e.g., New Jersey Ed. Assn. v. Burke,* 579 F.2d 764, 772-774 (CA 3 1978); *Lombard v. Board of Education,* 502 F.2d 631, 635-637 (CA 2 1974). Since no motion to suppress evidence on Fourth Amendment grounds was ever raised at the state-court proceedings, this case does not present questions as to the scope of collateral estoppel with respect to particular issues that were litigated and decided at a criminal trial in state court. As we did in *Allen v. McCurry,* 449 U.S. 90, 93 n.2, 101 S.Ct. 411, 414 n.2, 66 L.Ed. 2d 308 (1980), we now leave those questions to another day.

It is certain that the Fourth Circuit Court of Appeals by erroneously affirming the judgment of the United States District Court has joined the growing split among the various circuit courts of this country. Thus, the problem of the lack of uniformity and the quality of justice rendered depending on what United States Circuit a civil rights plaintiff is in, now places the awesome duty upon this Supreme Court to set a uniform judicial standard.

As a general proposition, Section 28 U.S.C. Section 1738 requires Federal Courts to give preclusive effect to state court judgments whenever the Courts of the State from which the judgments emerged would do so. *Kremer v. Chemical Construction Corp.,* 102 S.Ct. 1883 (1982); *Haring v. Prosise,* 103 S.Ct. 2368 (1983); *Allen v. McCurry,* 101 S.Ct. 411 (1980).

Nevertheless, "in federal actions, including Section 1983 actions, a state-court judgment will not be given collateral estoppel effect, however, where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first Court. *Haring v. Prosise,* 103 S.Ct. 2368 (1983); *Allen v. McCurry,* 101 S.Ct. 411 (1980); *Graves v. Olgiati,* 550 F.2d 1327 (1977); *Lombard v. Board of Education of City of New York,* 502 F.2d 631 (2d Cir. 1974).

This Court stated in *Haring v. Prosise (supra),* that "additional exceptions to collateral estoppel may be warranted in Section 1983 actions in light of the understanding of Section 1983, that the federal courts could step in where the state courts were unable or unwilling to protect federal rights." See also *Monroe v. Pape, (supra).* Accordingly, in an action under 42 U.S.C. Section 1983, 42 U.S.C. Section 1988 authorizes federal courts to disregard an otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying Section 1983. *Board of Regents v. Tomanio,* 100 S.Ct. 1790, 1795-96 (1980). In *Haring v. Prosise (supra),* this Court stated:

> "We have recognized various other conditions that must also be satisfied before giving preclusive effect to a state-court judgment. See generally, *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed. 2d 210 (1970). For example, collateral estoppel effect is not appropriate when "controlling facts or legal principles have changed significantly since the state-court judgment," *id.,* at 155, 99 S.Ct., at 974, or when "special circumstances warrant an exception to the normal rules of preclusion," *Montana v. United States, supra,* at 163, 99 S.Ct., at 978 (preclusive effect to a state-court judgment may be inappropriate when the Section 1983 claimant has not "freely and without reservation submitted his federal claims for decision by the state courts . . . and

> had them decided there . . .") (quoting *England v. Medical Examiners,* 375 U.S. 411, 419, 84 S.Ct. 461, 466, 11 L.Ed. 2d 440 (1964).

In this present case now before the court for review, the prior state proceeding concerned a simple contract action wherein a directed verdict was granted against the Petitioner Willie F. Allen. No attempt was made by the Petitioner to raise his Federal Constitutional claims. As a matter of fact, it would have been quite difficult to raise the constitutional issue in State Court pleadings since South Carolina operates under the old code pleading procedure. It is certain that he had no duty to raise his federal constitutional claims in the State proceedings. See *Lombard v. Board of Education,* 502 F.2d 631 (2d Cir. 1974); *Graves v. Olgiati,* 505 F.2d 1327 (2d Cir. 1977); *New Jersey Ed. Assn. v. Burke,* 579 F.2d 764 (3d Cir. 1978).

In *Lombard (supra),* the Second Circuit Court of Appeals declared that "for the Doctrine of issue preclusion to be applicable, the determination of the issue must have been necessary to the decision" in a prior state court proceeding. The Court in Lombard *(supra)* held that where a Federal Constitutional issue had not been raised in a prior state court proceeding, a litigant would not be barred under *res judicata* or collateral estoppel from raising the federal constitutional interest in a federal forum against the same adverse party. See also *Grave v. Olgiati,* 550 F.2d 1327 (2d Cir. 1977).

It is apparent from the foregoing that Petitioner has a federal due process right to have his federal grievances heard in a federal forum. In other words, the test is not whether the Petitioner had a full and fair opportunity to litigate his constitutional claims since the Petitioner never had a duty to raise his constitutional claims or federal statutory claims in a state court proceeding. The full and fair opportunity test is only applicable in context where federal claims are raised in the state court. This Court in *Allen v. McCurry,* 101 S.Ct. at 414 stated:

> "The Federal Courts have traditionally adhered to the related doctrine of *res judicata* and collateral

> estoppel. Under *res judicata,* a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Cromwell v. County of Sac.,* 94 U.S. 351, 352, 24 L.Ed. 195. Under collateral estoppel, once a Court has decided an issue of fact or law necessary to its judgment, that decision may predict relitigation of the issue in a suit on a different cause of action involving a party to the first case . . ."

In the instant case before the Court, *res judicata* or collateral estoppel is not applicable because the prior state proceeding never decided Petitioner's Civil Rights claims on the merits nor were any factual issues concerning violations of federal rights ever litigated or determined in the State Courts. Accordingly, it is quite impossible for the Petitioner to be relitigating a federal rights claim in Federal Court since such claims were never raised in the prior State Court proceeding. Moreover, the Petitioner is not seeking to relitigate factual issues raised in a prior proceeding in the context of a different cause of action. A violation of civil rights is a much more profound interest than a simple breach of contract.

Respondent will no doubt argue that the breach of contract issue will be relitigated in the Federal Court in the instant case if this Supreme Court overrules the Fourth Circuit Court of Appeals' affirmation of the United States District Court Judge's Order. (See Appendix for Judge's Order). Petitioner rejects this anticipated argument of Respondent and thus would assert that the Federal remedy in situations such as race discrimination is supplementary to state remedies. See *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473. Although an issue of breach of contract may develop within the context of the federal claim, the facts and circumstances concerning a contract terminable at will and one terminated solely on the basis of race are substantively different. In other words, a wrongful discharge is something other than a rightful discharge. The aforementioned ideas concerning *res judicata* are consistent with the *Allen v.*

McCurry (supra) opinion which recognized that an exception to *res judicata* and collateral estoppel would be appropriate in situations where state law did not provide fair procedure for the litigation of constitutional claims or where a state court failed to even acknowledge the existence of a constitutional right which a litigant based his claim. Still the Court was speaking within the context where a party had actually litigated his constitutional claim in a prior state court proceeding and then subsequently sought to relitigate the claim in federal court.

Thus, it is certain from the foregoing that the "full and fair opportunity to litigate" test is a test that is restricted to the context where a constitutional claim was raised in a prior state court proceeding and the litigant seeks to relitigate the claim in a federal forum.

In conclusion, a Federal Court should not abdicate its responsibility in hearing federal rights claims. *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473. Accordingly, local governmental units do not have an immunity or a defense of *res judicata* or collateral estoppel in the context where a custom and policy of such governmental units causes a constitutional violation. Moreover, even if this Court recognizes *res judicata* or collateral estoppel as a defense or immunity, the instant case before the Court is not the case for the application of such doctrines since the Petitioner had no incentive to bring his federal rights claim in state court. This Court should reverse the judgment of the Court of Appeals for the Fourth Circuit because Federal Civil Rights Petitioners are not barred by state principles of *res judicata* in the context presented by the facts of this case.

In the alternative, by employing their own rules of res judicata to the facts and circumstances of this case, the majority of the Fourth Circuit Court of Appeals committed judicial heresy and reversible error because (a) 28 U.S.C. Section 1738 mandates that Federal Courts are to apply the res judicata law of the State from which judgments are procured and (b) because South Carolina does not follow the "transaction" approach to claim preclusion and/or res judicata. (Emphasis Added)

In *Kremer v. Chemical Construction Corp.*, 102 S.Ct. 1883, 1889 (1982) the Supreme Court reaffirmed its interpretations of 28 U.S.C. Section 1738 by asserting that:

> "It has long been established that Section 1738 does not allow Federal Courts to employ their own rules of *res judicata* in determining the effect of State judgments. Rather it goes beyond the common law and commands a Federal Court to accept the rules chosen by the State from which the judgment was taken."

The Court went further in the *Kremer* case (*supra*) and stated that "Section 1738 requires Federal Courts to give the same preclusive effect to state court judgments that those judgments would be given in Courts of the State from which the judgments emerged."

Kremer (supra) is a commandment to Federal Judges not to tamper with the congressional intent of 28 U.S.C. Section 1738. Justice Phillips in his analysis of *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed. 2d 308 (1980), was sensitive about the commands of 28 U.S.C. Section 1738 when he wrote in his majority opinion of *Prosise v. Haring*, 667 F.2d 1133 (1981) that:

> "Specifically not decided by the McCurry Court was the questions 'how the body of collateral estoppel doctrine or 28 U.S.C. Section 1738 should apply", (*id* at original) including the question "whether any exceptions or qualifications within the bounds of the doctrines might ultimately defeat a collateral estoppel defense . . ."

Accordingly, this same jurist in his dissenting opinion in this case is convinced and rightly so that the majority in this case committed error in concluding that Petitioner, Willie F. Allen's Section 1983 action is barred by a prior State Court judgment because the Civil Rights claim could clearly have been raised in Allen's earlier court suit.

Justice Phillips in dissent in this case stated:

"The majority concludes that the instant Section 1983 actions is barred by the prior state court judgment "because the Section 1983 claim clearly could have been raised in Allen's earlier state court action."

This may reflect an entirely correct application of the modern "transactional" approach to determining the scope of claims, hence the claim-preclusive effect of prior judgments under *res judicata* principles, see *Restatement (Second) of Judgments*, Section 24 and comment a (1982).

By my reading, South Carolina has traditionally and still applies the classically more narrow view of the scope of a claim or cause of action for *res judicata* (bar or merger) purposes. Under the view, successive claims are the "same" claim for *res judicata* purposes only: "(i)f the same facts or evidence would sustain both," *Griggs v. Griggs*, 214 S.C. 177, 184, 51 S.E. 2d 622, 626 (1949); and if both involve the same primary right of the plaintiff and duty of the defendant, see *Harth v. United Insurance Company of America*, 266 S.C. 1, 221 S.E. 2d (1975). See generally *Stewart, res judicata and Collateral Estoppel in South Carolina*, 28 S.C.L. Rev. 451, 453-61 (1977).

Applying either test, I think it is plain that Allen's Section 1983 claim would not be barred by the prior judgment on his contract claim. The facts necessary to proving his allegation that he was terminated for racially discriminatory reason surely differ from the facts needed to show a breach of Allen's termination. Moreover, these two actions do not involve the same primary right and duty. Cf. *Stewart*, (supra), at 458 ("a defendant may be sued separately for damages resulting from the wrongful death of plaintiff's deceased and for injuries to the deceased under a survival statute.")

Since Phillips wrote the majority opinion in Court's *Prosise v. Haring,* 667 F2d 1133 (1983) it is clear there is a conflict in the Fourth Circuit.

Thus, for the foregoing reasons, the judgment of the Court of Appeals for the Fourth Circuit must be reviewed and ultimately reversed.

CONCLUSION

For the above-stated reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

By: FLETCHER N. SMITH, JR.

Fletcher N. Smith, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the thirteenth day of February, 1984, forty copies of the Petition for Writ of Certiorari were delivered by mail to the Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543. I further certify that all parties required to be served have been served; specifically, Joseph Earle, Esquire, Greenville County Courthouse, East North Street, Greenville, South Carolina 29601.

FLETCHER N. SMITH, JR.

Fletcher N. Smith, Jr.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1798

WILLIE F. ALLEN, d/b/a WILLIE F. ALLEN Janitorial Service,

Appellant,

v.

GREENVILLE COUNTY, A POLITICAL SUBDIVISION,

Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. William W. Wilkins, Jr., Judge.

Argued: April 15, 1983 Decided: July 26, 1983

Before HALL and PHILLIPS, Circuit Judges and BRYAN, Senior Circuit Judge,

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Theo Walker Mitchell (Fletcher N. Smith, Jr. on brief) for Appellant; Charles Richard Stewart and Joseph H. Earle, Jr. for Appellee.

BRYAN, Senior Circuit Judge:

Appellant Willie F. Allen[1] contracted with Greenville County, South Carolina to provide janitorial services for certain County buildings for a twelve month period at a stated consideration of $126,000.00. The agreement was terminable

[1] D/b/a Willie F. Allen Janitorial Service.

at will by either party upon 10 days written notice. He began performance and continued until the County exercised its right of termination and accordingly notified Allen of its intention to bring the contract to a close.

On October 30, 1980 in the Court of Common Pleas of Greenville County, Allen sued the County for breach of the agreement. He pleaded the contract and his full performance of it and the County's enlargement of Allen's obligations beyond the terms of the contract. Additionally, he alleged precontract misrepresentation by the County of the extent and volume of work involved as well as the injustice by the County. Trial of the action resulted in a directed verdict for the County. Allen did not appeal.

In May 1982 Allen sued the County in the United States District Court for South Carolina asserting that the contract had been brought to an end for racially discriminatory reasons, in violation of his civil rights guaranteed by the Constitution of the United States and remediable under the provisions of 42 U.S.C. §§ 1981, 1982, 1983 and 1988.

Upon due hearing the Court ruled that the doctrine of *res judicata* barred Allen from litigating under section 1983 because the claim clearly could have been raised in Allen's earlier State court action. The action was then dismissed with prejudice and this appeal followed.

We conclude that the District Court's dismissal was plainly right. There was but a single cause of action—the termination of the agreement. The sole injury for which Allen sought compensation was the allegedly wrongful termination of the contract. The State court had, however, determined that the termination was proper and pursuant to the contract terms. Its judgment of the merits is a finality as to the claim in controversy and forecloses further litigation.

AFFIRMED.

PHILLIPS, Circuit Judge, dissenting:

I respectfully dissent.

The majority concludes that the instant § 1983 action is barred by the prior state court judgment "because the [§ 1983] claim clearly could have been raised in Allen's earlier state court action."

This may reflect an entirely correct application of the modern "transactional" approach to determining the scope of claims, hence the claim-preclusive effect of prior judgments under *res judicata* principles, *see Restatement (Second) of Judgments* § 24 & comment *a* (1982). But it does not accurately reflect my reading of South Carolina *res judicata* law, which 28 U.S.C. § 1738 mandates must control our determination of the preclusive effect of the prior state court judgment. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982).

By my reading, South Carolina has traditionally and still applies the classically more narrow view of the scope of a claim or cause of action for *res judicata* (bar or merger) purposes. Under that view, successive claims are the "same" claim for *res judicata* purposes only: "[i]f the same facts or evidence would sustain both," *Griggs v. Griggs*, 214 S.C. 177, 184, 51 S.E.2d 622, 626 (1949); and if both involve the same primary right of the plaintiff and duty of the defendant, *see Harth v. United Insurance Co. of America*, 266 S.C. 1, 221 S.E.2d 102 (1975). *See generally* Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 28 S.C. L. Rev. 451, 453-61 (1977).

Applying either test, I think it plain that Allen's § 1983 claim would not be barred by the prior judgment on his contract claim. The facts necessary to proving his allegation that he was terminated for racially discriminatory reasons surely differ from the facts needed to show a breach of contract not even addressed to the question of Allen's termination. Moreover, these two actions do not involve the same primary right and duty. *Cf.* Stewart, *supra*, at 458 ("a defendant may

be sued separately for damages resulting from the wrongful death of plaintiff's deceased and for injuries to the deceased under a survival statute").

I would reverse the district court and remand for proceedings on the merits of Allen's claim.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Civil Action No. 82-1121-14

ORDER

Willie F. Allen, d/b/a
Willie F. Allen Janitorial Service,
Plaintiff,

vs.

GREENVILLE COUNTY, a
Political Subdivision,
Defendant.

This matter comes before the Court on Defendant's *motion to dismiss* or, in the alternative, for *summary judgment.* Following a hearing on this issue, the Court concludes that Plaintiff's cause of action is *barred by res judicata.*

Plaintiff filed this suit under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, 2202 alleging that his contract to provide janitorial services was terminated by Defendant for racially discriminatory reasons, in violation of his civil rights under the Constitution and 42 U.S.C. §§ 1981, 1982, 1983 and 1988. The contract, which was executed July 7, 1980, provided that Plaintiff was to provide janitorial services for certain county buildings for a 12-month period for a stated consideration of $126,000.00. The contract was terminable at will by either party upon 10 days written notice. Defendant subsequently

exercised this right of termination and notified Plaintiff of its intention to terminate the contract.

On October 30, 1980, Plaintiff filed suit in the Court of Common Pleas of Greenville County seeking damages for Defendant's alleged breach of contract. In that complaint, Plaintiff alleged the existence of the contract, the termination provision, performance by Plaintiff, activities by Defendant which increased Plaintiff's work under the contract, misrepresentation by Defendant, and termination of the contract by Defendant. The trial in state court resulted in a *directed verdict for Defendant on December 11, 1981.* Plaintiff did not appeal the state court's judgment. *He now files suit in this Court, alleging that his contract was terminated for racial reasons.* Defendant challenges Plaintiff's right to bring this action in federal court following an adverse determination in the state court action. In addition, *Defendant claims that Plaintiff's complaint is so conclusory as to be insufficient* to state a claim under 42 U.S.C. § 1983.

The Supreme Court, in *Allen v. McCurry,* 449 U.S. 90 (1980) held that collateral estoppel could properly be *invoked to bar relitigation of a civil rights issue previously raised in a state court proceeding.* The Court stated that nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment when the state court, acting within its proper jurisdiction, has given the parties "a full and fair opportunity to litigate federal claims." 449 U.S. at 104.

The issue against which collateral estoppel was raised in *Allen v. McCurry* was whether law enforcement officers' search and seizure exceeded permissible bounds. Finding that plaintiff had had a full and fair opportunity to litigate the constitutionality of the search and seizure in the state court suppression hearing, the Supreme Court held that a subsequent § 1983 challenge was barred by collateral estoppel. The Court expressly refused to consider the question of whether the

normal rules of claim preclusion should apply "where a § 1983 plaintiff seeks to litigate in federal court a federal issue which he could have raised but did not raise in an earlier state-court suit against the same adverse party." 449 U.S. at 97 n.10. This is the precise question presented in the case at bar.

Since *Allen v. McCurry,* the Fourth Circuit has not addressed this specific question. However, in a slightly different context, that court allowed a § 1983 plaintiff to pursue his civil rights claim in federal court following disposition of a related matter in state court. *See Prosise v. Haring,* 667 F.2d 1133 (4th Cir. 1981).

The Fourth Circuit in *Prosise* held that, while a state judgment based on a guilty plea should ordinarily have a preclusive effect in a later § 1983 action as to all issues representing essential elements of the crime, it should not have preclusive effect as to potential but not actually litigated issues respecting the exclusion of evidence on Fourth Amendment grounds. The Court reasoned that a state criminal defendant should not be precluded from raising search and seizure questions after a guilty plea when "the state has so sufficient an amount of untainted evidence that making the effort [to suppress] would in the end be futile and possibly even harmful to the defendant's immediate interests." 667 F.2d at 1141.

Clearly, the determinative factor was Defendant's disincentive to challenge constitutional deprivations in the criminal forum with potentially adverse consequences, as opposed to pleading guilty to the crime and later raising constitutional questions which do not go to the essential elements of the crime. Implicit in the Court's reasoning was the leverage, created by the criminal forum, which may cause a defendant to forego vindication of his constitutional rights.

But that is not the situation before this Court. Here Plaintiff initiated legal proceedings. He originally and intentionally selected the state court forum. There was no

disincentive here, as there was in *Prosise,* which might deter Plaintiff from raising his constitutional claims in the state court proceeding. And there was nothing in the law which prohibited Plaintiff from raising a § 1983 cause of action in state court. Likewise, Plaintiff could have initially brought his § 1983 action in federal court and joined his contract claim through pendent jurisdiction. Plaintiff was thus given the unfettered choice of selecting the forum, state or federal, where all claims arising from this contract could have been litigated and resolved. In either forum, a "full and fair opportunity to litigate federal claims" was available. 449 U.S. at 104.

The doctrines of collateral estoppel and *res judicata* are frequently invoked to prevent needless litigation, relieve parties of the cost and vexation of multiple lawsuits and conserve judicial resources. Under *res judicata,* a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *See Allen v. McCurry,* 449 U.S. at 94.

The question now before this Court is whether *res judicata* should be applied so as to bar Plaintiff from now litigating his § 1983 claim; a claim which clearly could have been raised in Plaintiff's earlier state court action.

The principle of "*res judicata* applies to § 1983 actions and operates as a bar to the relitigation of constitutional issues actually raised as well as to constitutional issues that could have been raised in a prior lawsuit if the second suit concerns the same operative nucleus of fact." *Robbins v. District Court of North City, Iowa,* 592 F.2d 1015, 1017 (D.C. Iowa 1979).

In a case very similar to the one at bar, the Fifth Circuit affirmed the district court's dismissal of a § 1983 action in which a former teacher claimed she was discharged because of her

race. The Court said that "[U]nder the doctrine of *res judicata*, the prior judgment of the state court is conclusive as to all matters which were litigated or might have been litigated therein and bars a subsequent decision by the federal courts." *Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5th Cir. 1976), citing *Frazier v. East Baton Rouge Parish School Board*, 363 F.2d 861 (5th Cir. 1966).

During oral arguments, counsel for Plaintiff, in response to inquiry from the Court, speculated that perhaps Plaintiff did not realize he had an action under § 1983 and that perhaps new facts, after the state court action, have now been brought to light. This assertion was not supported by the pleadings, testimony, nor affidavits. Indeed, Plaintiff's attorneys offered no facts or evidence on which this assertion could be based. It amounted to no more than raw speculation and is unworthy of consideration.

Plaintiff's alleged causes of action, including any charge under § 1983, arose in 1980. He elected the state court forum in which to litigate. He may not now come to this forum raising an issue which properly should have been raised in the prior litigation.

Since disposition of this issue ends the case, it is unnecessary to address Defendant's arguments relative to the technical sufficiency of the Complaint. Plaintiff's Complaint is dismissed with prejudice.

AND IT IS SO ORDERED.

WILLIAM W. WILKINS, JR.

William W. Wilkins, Jr.
United States District Judge

A TRUE COPY
Attest: John W. Williams, Clerk

By: E. JEAN HOWARD
Deputy Clerk

Greenville, S. C.
August 20, 1982.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1798

WILLIE F. ALLEN, d/b/a
WILLIE F. ALLEN JANITORIAL SERVICE,
Appellant,

v.

GREENVILLE COUNTY, a POLITICAL SUBDIVISION,
Appellee.

ORDER ON REQUEST FOR REHEARING

Upon consideration of the appellant's petition for rehearing, as supplemented, with suggestion for rehearing en banc of the order of the court affirming the District Court on appeal, but no request for a poll on this suggestion, it is now

ORDERED:

That the motion for rehearing by the panel of this court which heard the appeal be, and it is hereby, denied.

Done at Richmond, Virginia, this 18th day of October, 1983 at the direction of Hall and Bryan, JJ., Phillips, J., dissenting.

/s/ WILLIAM K. SLATE, II
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-608

WILLIE F. ALLEN, dba
WILLIE F. ALLEN JANITORIAL SERVICE,
Petitioner,

v.

GREENVILLE COUNTY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 23, 1984.

/s/ WARREN BURGER
Chief Justice of the United States.

Dated this 1st day of February, 1984.

CONSTITUTION OF THE UNITED STATES

AMENDMENT 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 USCS § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

(June 25, 1948, c. 646, § 1, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, P. L. 85-508, § 12(e), 72 Stat. 348.)

28 USCS § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

28 USCS § 1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(June 25, 1948, c. 646, § 1, 62 Stat. 930; July 25, 1958, P. L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, P. L. 94-574, § 2, 90 Stat. 2721.)

28 USCS § 1738

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, c. 646 § 1, 62 Stat. 947.)

42 USCS § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R. S. § 1977.)

42 USCS § 1982

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens

thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

(R. S. § 1978.)

42 USCS § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R. S. § 1977.)

42 USCS § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(R. S. § 1979.)

42 USCS § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions

necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found quilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(R. S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641.)

No. 83-1342

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

WILLIE F. ALLEN, d/b/a
WILLIE F. ALLEN JANITORIAL SERVICE,
Petitioner,

v.

GREENVILLE COUNTY,
A POLITICAL SUBDIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Joseph H. Earle, Jr., *Esquire*
Charles Richard Stewart, *Esquire*

Counsel of Record

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Room 100, Courthouse Annex
Greenville, South Carolina 29601
(803) 298-8581

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Whether Plaintiff is barred under the doctrine of *res judicata* and claim preclusion from litigating an issue which has been decided against him in prior state court proceedings?

2. Whether Plaintiff is foreclosed from litigating his civil rights allegations when they clearly might have been raised in his state court lawsuit?

3. Whether the Fourth Circuit Court of Appeals misinterpreted the South Carolina law governing *res judicata* in determining that Plaintiff states only one cause of action in his state and federal lawsuits?

LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the parties whose names are contained in the caption.

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TABLE OF AUTHORITIES

IN THE

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Petitioner,

v.

GREENVILLE COUNTY,
A POLITICAL SUBDIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF CASE

On or about July 7, 1980, Appellant and Respondent entered into a contract whereunder the Appellant was to provide janitorial services to all buildings operated and maintained by the Respondent. The contract covered a period of twelve months and the contract price was $126,000.00. The contract was terminable at will by either party upon ten (10) days' written notice to the other. Respondent gave the necessary ten (10) days' notice to Appellant and terminated the contract for unsatisfactory performance after three (3) months' performance by the Appellant, and thereupon Appellant filed an action in the Court of Common Pleas for Greenville County seeking money damages for breach of contract. The State Court judge, after hearing testimony from both sides, directed a verdict for Respondent on December 11, 1981. This judgment was not appealed.

After a short time Appellant filed a suit in the U.S. District Court for South Carolina (Greenville Division) alleging that the contract had been improperly terminated because he is a black man, and the termination thereby violated his civil rights guaranteed by the Constitution of the United States and the provisions of 42 U.S. Code Sections 1981, 1982, 1983, and 1988.

The Respondent filed a Motion to Dismiss or in the alternative a Motion for Summary Judgment. Respondent also served and filed an Answer to the Complaint.

On August 12, 1982, a hearing on the Motion to Dismiss and the Motion for Summary Judgment was held before the Honorable William W. Wilkins, Judge of the Federal District Court. Subsequently, Judge Wilkins issued an Order in which he sustained the Respondent's Motion to Dismiss and Motion for Summary Judgment based on the doctrine of *res judicata* and collateral estoppel. Thereafter Appellant appealed the order of Judge Wilkins to the Fourth Circuit Court of Appeals, which affirmed the order. Appellant thereafter sought a rehearing before the three judge panel of the Fourth Circuit Court of Appeals or, in the alternative, a rehearing before the Fourth Circuit Court of Appeals *en banc*. This request for rehearing was denied, resulting in Appellant's seeking a review of the Circuit Court of Appeals' Order upon Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The Fourth Circuit Court of Appeals, Justice Phillips dissenting, determined that Willie Allen was foreclosed from litigating his allegations of racial discrimination in the loss of his janitorial contract with Greenville County. The basis of this decision was that, once the South Carolina Court of Common Pleas had determined the County acted properly in terminating Allen's contract, he could not relitigate that determination by claiming the termination was improper because it was based on racial *animus*.

Allen's only complaint is that he lost the contract. There are a variety of reasons why a person may lose a job; unfairness on the part of the other party is one reason, incompetence is another. If however, the termination is ever found to be proper, this logically forecloses a further litigation of the propriety of the termination. The law in South Carolina provides that a contract cannot be terminated (even with a "termination at will" clause) if doing so could be inequitable or unconscionable. The state court ruled that the county terminated the contract for a proper reason, and so granted the county a directed verdict. This was not appealed, so Allen is bound by the state court finding. In this particular situation, South Carolina Courts would recognize that Willie Allen is seeking to litigate the *same* issue twice, and under the state's *res judicata* law, another lawsuit would not be allowed.

There was nothing to prevent Willie Allen from bringing his civil rights claims in the state court. He should not be allowed to bring them now, since the propriety of the contract's termination has been already determined. This is particularly true in this day of protracted and multiplicitous lawsuits.

ARGUMENT

Greenville County begins its response to the Petition for a Writ of Certiorari by reaffirming the statement which was made by Justice Dickson Phillips during oral argument in the Fourth Circuit Court of Appeals. When counsel for Willie Allen expressed his opinion that the case of *Prosise vs. Haring*, 664 F.2d 1133 (4th Cir., 1981) mandated reversal of the District Court's judgment, Judge Phillips informed counsel for both parties that, as the author of the *Prosise* opinion, it was his opinion that that case had nothing to do with Mr. Allen's situation. Allen's continued reliance of *Prosise* [and on this Court's decision in *Haring vs. Prosise*, 103 S.Ct. 2368 (1983)] thus is completely misplaced.

Prosise was limited to the holding that a criminal defendant who pleads guilty to a charge in State Court, and then attempts to raise constitutional search and seizure question in a §1983 action in Federal Court, is not barred from so doing by the doctrine of *res judicata*. It has no relevance whatsoever to the question which has already been decided by the Fourth Circuit in this case, namely, whether a civil plaintiff with a choice of forums and issues to be raised may relitigate the same "core issue" after it has been decided against him.

The only source of Justice Phillips' dissent in the Court below is his conclusion that the majority wrongly applied the facts to South Carolina Law. *Griggs vs. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949) is cited for the proposition that "successive claims are the 'same' claim for *res judicata* purposes only: 'if the same facts or evidence would sustain both'." *Griggs* involved issues of property ownership based on deeds in one case, and ownership based on adverse possession in the other. The proof of these successive issues obviously would have rested on different facts or evidence.

Griggs is readily distinguishable from the present case. In the state court trial, the County's motion for a nonsuit (based on the "termination at will" clause in the contract) was denied, based on the rule enunciated in *Philadelphia Storage Battery Co. vs. Mutual Fire Stores*, 161 S.C. 487, 159 S.E. 825 (1931). That case, also involving a contract with a "termination at will" clause, held

that a party may not terminate a contract if doing so would be inequitable or unfair to the other party, or against good conscience. 159 S.E. at 826.

> "That standard of conduct is far more stringent than one forbidding only actual fraud, and it may apply to an unconscionable reason for termination as well as to the causing of needless injury in the course of termination." *de Treville vs. Outboard Marine Corporation*, 439 F.2d 1099 (4th Circuit, 1971) (citing *Philadelphia Storage.)*

Allen's counsel raised the possibility that the County was somehow unfair or acted inequitably in terminating its contract with Allen, and Judge Pyle denied the County's motion for a nonsuit after the plaintiff presented his case. However, after the County's witnesses testified and were fully cross-examined by Allen's counsel, Judge Pyle concluded that no issue of fact as to any inequity or unfairness on the county's part had been raised. The judge granted the county's motion for a directed verdict, ruling as a matter of law that the county's termination was lawful and pursuant to contract terms.

In his Federal court case, Willie Allen attempts to relitigate the question raised by him and decided against him in State Court, namely the propriety of the termination of his contract. Even under *Griggs*, this cannot be done. If he had proven racial discrimination at the state court trial, then certainly the issue of inequity and unfairness would have been decided differently. Under *Griggs*, the same proof which would sustain his federal claim would also have sustained his state claim. Contrary to Justice Phillips' assertion, therefore, the majority correctly applied the *Griggs* test to the facts of this case.

South Carolina Courts have not interpreted *Griggs* as literally as Allen says they have. In this regard, *Harth vs. United Insurance Company of America*, 266 S.C. 1, 221 S.E.2d 102 (1975), is helpful, as it presents a more modern view of *res judicata* than does *Griggs*. It involved twelve separate lawsuits brought on the basis of plaintiff's payment of twelve separate weekly premiums based on alleged fraudulent representations made by an insurance agent on the first of his twelve collection

visits. Although the court recognized that each of the twelve lawsuits was based on a technically different set of facts in that the subject collections were made consecutively, seven days apart, it limited plaintiff to one lawsuit for all her damages. The South Carolina Supreme Court stated at 221 S.E.2d at p. 104:

> "[T]he leading principle in a modern system of procedure is the avoidance of a multiplicity of suits, and the settlement in one action of all respective claims of the parties when they are of such nature as to admit of adjustments in one action." *Ripley vs. Rodgers*, 213 S.C. 541, 50 S.E.2d 575 (1948).
>
> The problem here in implementing this goal is the determination of what constitutes a single cause of action. It was defined in *Brice v. Glen*, 165 S.C. 509, 164 S.E. 302 (1932) as:
>
> > "a primary right possessed by plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consists in a breach of such primary right, and duty . . .
> >
> > "The cause of action has been described as being a legal wrong threatened or committed against the complaining party. And the object of the action is to prevent, or redress the wrong by obtaining legal relief. The *subject* of the action is, clearly, neither of these; it is not the wrong which gives the plaintiff the right to ask the interposition of the Court; nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this ordinarily is the property, or the contract and its subject matter, or other thing involved in the dispute.' "
> > *Brice*, supra, 164 S.E. at 303, 304.

> 1 The *primary right* involved here was the respondent's right to have the agent with whom she dealt and his company faithfully carry out their *primary duty* to maintain the policy in force while receiving her money. The *wrong* is the alleged failure of the company and its agent to meet that duty and in taking and retaining the premiums for the twelve weeks described while not maintaining the policy in effect. The separate collections involved here are merely cumulative damages to the respondent concerning the invasion of the same primary right. The *subject* of the twelve actions involves the allegedly wrongful cancellation of a single insurance policy. Although respondent did not sue *ex contractu* on the policy, cancellation of the policy is, nevertheless, the *subject* of the action. The controversy would not have arisen without the existence of the insurance policy."

Similarly, the primary right in the *Allen* case is Allen's right to perform janitorial services under his contract with the county; the primary wrong of which he has complained is that his company was inequitably or unfairly denied the right to perform those services. The *subject* of both the State and Federal Court suits was the propriety or legality of the County's termination of the contract. Had Allen not been initially granted the contract, there would be no lawsuit today, and any claim of racial *animus* is just an additional cumulative *reason* why Allen says he may have unfairly lost the contract. This issue, of course, has already been decided against him.

The Fourth Circuit Court of Appeals stated: "There was but a single cause of action—the termination of the agreement. The sole injury for which Allen sought compensation was the allegedly wrongful termination of the contract. The State Court, however, determined that the termination was proper and pursuant to the contract terms." This statement is completely in accord with *Harth's* modern view of claim preclusion and indicates that the Court of Appeals agrees with the District Court's view that the single issue in both cases was the propriety of Willie Allen's losing his contract with the County. Justice Phillips' conclusion,

that the question of racial discrimination is separate from the question of the propriety of the termination of the contract, disregards the fact that the only alleged result of any racial discrimination was the unfair or unconscionable loss of the contract. Allen's brief states that ". . . a wrongful discharge is something other than a rightful discharge." Petitioner's Brief, p. 8. Obviously, the State Court determined that the discharge (or termination) was rightful, and Allen cannot now relitigate the question. Seen in this light, the majority decision is in accord with modern South Carolina *res judicata* law and should not be disturbed.

The Federal District Court of South Carolina addressed a very similar situation in *Wham vs. United States*, 458 F.Supp. 147 (1978). Wham, a former postal employee, sued the Postal Service seeking reinstatement and back pay. He lost the case on summary judgment, but subsequently brought suit (based on the same loss of his job) under the Federal Tort Claims Act. Judge Robert Hemphill dismissed this second lawsuit, among other reasons, because it was barred by the doctrine of *res judicata*. As Judge Hemphill states at 458 F.Supp. at 151:

> "Plaintiff's suit is barred by the doctrine of *res judicata*. A reading of plaintiff's complaint makes it clear that his cause of action is to review his removal from the Postal Service, not whether the plaintiff has suffered damages from a tortious act committed by the defendant.
>
> * * *
>
> "The doctrine of *res judicata* is especially applicable where protracted and multiple litigation of similar issues appears to be in the offing. *Rhodes v. Jones*. 351 F.2d 884 (8th Cir. 1965) cert. denied, 383 U.S. 919, 86 S.Ct. 914, 15 L.Ed.2d 673."

Similarly, a reading of Allen's complaint in Federal Court, which exactly restates the allegations of the State Court complaint except for general allegations of racial discrimination, reveals that it is an obvious attempt to review the termination of his contract, not an effort to raise legitimate constitutional issues.

In *Tillie vs. Glen Falls Insurance Company*, 208 F.Supp. 921 (D.C.S.C. 1962), the plaintiff first sued the sheriff and deputy of Anderson County for civil rights violations. The second suit restated the identical facts, but omitted the allegations of civil rights violations and sued for the surety company's breach of the bond given by the sheriff and his deputy. Judge Wyche, writing for the district court in *Tillie*, pointed out that "the only claim for relief against this surety company in both of the claims is the breach of the $10,000.00 official bond of Sheriff Erskine by the alleged wanton delicts of Deputy Gerrard. They are based on the same bond, the same breach thereof by the same deputy, alleged *in totidem verbis*. The surety company did not violate plaintiff's federal or state civil rights, and there was but one violation alleged. The allegation in civil action number 2733 that the deputy's action was done with intent to violate plaintiff's federal rights and did violate the same is merely a postulate to the delineation of the alleged torts. A postulate is defined as 'a position assumed without proof or one that is considered self-evident . . . a necessary assumption'." 208 F.Supp. at 923.

In *Tillie*, the Court isolated a factor which is again present in the Allen case; that is the presence of the civil rights allegations as a "postulate" of the real issue in the case—the propriety of the County's termination of Willie Allen's janitorial contract. One is not discriminated against in a vacuum: one loses certain rights because of race, as opposed to some other reason. Allen merely recites his state court allegations in the federal court complaint, and adds that the contract was lost because of his race. There was a full and fair litigation of the propriety of the termination in the first trial, and the only damage Allen alleges in either case was the loss of his contract.

CONCLUSION

Even the most restrictive interpretation of *res judicata* principles recognizes that a plaintiff cannot manufacture successive lawsuits by merely alleging a new pretext or "postulate" for relitigating issues already decided against him. Willie Allen attempts to do so in this case. The *Tillie*, *Harth* and *Wham* cases show that South Carolina Courts do recognize that the plaintiff has only "one bite of the apple" (221 S.E.2d at 105), one opportunity to seek redress for a single wrong. This is particularly true in this day of overcrowded courts and multiplicitous lawsuits.

U.S. Supreme Court Rule 17 indicates some of the factors considered by the Court in deciding whether to grant review on *writ of certiorari*. Greenville County's position is that the Fourth Circuit Court of Appeals' decision in this case in no way conflicts with any other Court of Appeals decision, nor does this decision conflict with South Carolina Supreme Court decisions such as *Harth*. Certainly there has been no departure from the usual course of judicial proceedings which would warrant this Court's exercising its supervisory powers. No important question of federal law is involved here; the Court below merely reaches the common sense conclusion that, once the South Carolina Court ruled the county had acted rightly in terminating Allen's contract, he cannot go back to court to say the termination was wrongful. That decision should not be disturbed and the petition should be denied.

Respectfully presented,
COUNTY OF GREENVILLE

BY: _____
Joseph H. Earle, Jr.,
Greenville County Attorney

And _____
Charles Richard Stewart,
Staff Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the day of March, 1984, forty copies of the Brief for Respondent in Opposition were delivered by mail to the Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543. I further certify that all parties required to be served have been served; specifically Fletcher N. Smith, Jr., Esquire, Mitchell, Smith & Pauling, 9 Bradshaw Street, Greenville, South Carolina 29601.

/s/

Joseph H. Earle, Jr.
Greenville County Attorney